LEVINE, BLASZAK, BLOCK & BOOTHBY, LLP

2001 L STREET, NW
SUITE 900
WASHINGTON, D.C. 20036
(202) 857-2550
FAX (202) 223-0833

February 19, 2003

VIA ELECTRONIC COMMENT FILING SYSTEM

Ms. Magalie Roman Salas

Office of the Secretary
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, DC 20554

Re: Revision of Commission's Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems, and Amendment of Parts 2 and 25 to Implement the Global Mobile Personal Communications by Satellite (GMPCS) Memorandum of Understanding and Arrangements; Petition of the National Telecommunications and Information Administration to Amend Part 25 of the Commission's Rules to Establish Emissions Limits for Mobile and Portable Earth Stations Operating in the 610-1660.5 MHz Band.

CC Docket No. 94-102 and IB Docket 99-67

Dear Ms. Salas:

Pursuant to the December 20, 2002 Further Notice of Proposed Rulemaking in the above-referenced proceeding, enclosed please find the Comments of the Ad Hoc Telecommunications Users Committee ("Ad Hoc"). Ad Hoc's Comments are being transmitted to the Federal Communications Commission via the Federal Communications Commission's Electronic Comment Filing System ("ECFS"). These comments are being filed on February 19, 2003 rather than the February 18 date set forth in the Further Notice of Proposed Rulemaking because the federal government was closed on February 18.

If you have any questions or concerns, please do not hesitate to contact me at (202) 857-2550.

Respectfully submitted,

James S. Blaszak

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Revision of the Commission's Rules to Ensure Compatibility With Enhanced 911 Emergency Calling Systems	)	CC Docket No. 94-102
	)	
Amendment of Parts 2 and 25 to Implement the Global Mobile Personal Communications by Satellite (GMPCS) Memorandum of Understanding and Arrangements; Petition of the National Telecommunications and Information Administration to Amend Part 25 of the Commission's Rules to Establish Emissions Limits for Mobile and Portable Earth Stations Operating in the 610-1660.5 MHz Band	)	IB Docket No. 99-67

COMMENTS OF THE
AD HOC TELECOMMUNICATIONS USERS COMMITTEE

James S. Blaszak
Stephen J. Rosen
Andrew M. Brown
Levine, Blaszak, Block and Boothby, LLP
2001 L Street, NW
Suite 900
Washington, DC 20036
202-857-2550

Counsel for
The Ad Hoc Telecommunications
Users Committee

February 19, 2003

SUMMARY

In its *Further Notice of Proposed Rulemaking* the Commission seeks further comments on whether it should revise its rules, and if so how, to ensure compatibility between Multi-line Telephone Systems ("MLTS") and Enhanced 911 ("E911") Emergency Calling Systems. Ad Hoc supports the Commission's general efforts to expand the availability of E911 services but encourages the Commission to act in a manner consistent with its statutory jurisdiction and specialized expertise regarding communications services and equipment. To that end, Ad Hoc urges the Commission to adopt the following positions with regard to multi-line telephone systems.

Because the Commission lacks the jurisdiction to impose what are workplace regulations on operators of multi-line telephone systems at places of employment, the Commission should defer to other agencies that have greater expertise and clearer jurisdiction over such employers. The specific determination of the appropriate type of call-back or location information that should be transmitted by a workplace location to emergency service providers or Public Safety Answering Points ("PSAPs"), and an employer's responsibility for establishing and maintaining this information, should be made by those state and federal agencies with the principal mission and jurisdiction to regulate workplace safety issues. Agencies such as the Occupational Safety and Health Administration ("OSHA") and its state counterparts are not only authorized by statute to regulate the safety of America's workplaces, but they also have the expertise to develop regulations that: (a) would be of the greatest use to emergency services providers and their personnel; and (b) appropriately consider the costs imposed upon

employers relative to the safety benefit actually extended to those located in a workplace.

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COMMENTS OF THE
AD HOC TELECOMMUNICATIONS USERS COMMITTEE

The Ad Hoc Telecommunications Users Committee ("Ad Hoc") hereby submits its comments in response to the Commission's December 20, 2002 *Further Notice of Proposed Rulemaking* ("*E911 FNPRM*") in the above-captioned proceeding.[1] As described in greater detail below, because the Commission lacks requisite jurisdiction

[1] *Revision of Commission's Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems*, CC Docket No. 94-102, IB Docket No. 99-67, Further Notice of Proposed Rulemaking, FCC 02-326 (December 20, 2002) *("E911 FNPRM")*. These comments are being filed on February 19, 2003 rather than the February 18, 2003 date set forth in the *E911 FNPRM* because the federal government was closed on February 18, 2003. *See* Public Notice, rel. Feb. 19, 2003.

over Multi-Line Telephone Systems ("MLTS") operators, it must decline to impose E911/MLTS requirements on them.

I. THE PROMULGATION OF REGULATIONS THAT REQUIRE EMPLOYERS WHO OPERATE MULTI-LINE TELEPHONE SYSTEMS TO TRANSMIT SPECIFIC CALLING NUMBER AND LOCATION INFORMATION SHOULD BE LEFT TO AGENCIES WITH JURISDICTION OVER AND EXPERTISE IN WORKPLACE SAFETY MATTERS

In response to the Commission's request for comments regarding the appropriate role for the FCC in promulgating regulations that require multi-line telephone systems to deliver call-back and location information,[2] Ad Hoc generally supports the Commission's efforts to serve the public interest by promoting the delivery of accurate location information and callback numbers to emergency services personnel. The Commission, however, cannot promulgate regulations that exceed its statutory jurisdiction and that fall within the explicit jurisdiction and expertise of other federal and state agencies.

In the case of MLTS operated by businesses and places of employment, the primary rationale for requiring such entities to transmit call back or location information to Public Safety Answering Points ("PSAPs") is to enhance the safety of workplaces. Although Ad Hoc, of course, supports this objective, regulation of workplace safety exceeds the express jurisdiction of the Commission and should be undertaken by those federal and state agencies expressly designated by Congress to develop expertise regarding regulations for workplace safety.

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[2] *Id.*, ¶ 81.

A. Whether to Require Multi-Line Telephone Systems to Transmit Call-Back or Location Information to PSAPs Is A Workplace Safety Issue

Although the Commission may promulgate, if justified by the record, a general requirement that newly manufactured customer premises equipment ("CPE") be capable of transmitting automatic number identification/automatic location information ("ANI/ALI"), the Commission should not prescribe the type of information that MLTS used in places of employment should transmit to PSAPs and the steps that employers must take to update and maintain this information. In the specific case of multi-line telephone systems that are used at places of employment, including office buildings and campuses, manufacturing facilities, and other non-residential areas, the determination of whether such systems must transmit call back and location information to emergency service providers is fundamentally a workplace safety issue.[3]

Places of employment, where many multi-line telephone systems are located, are already subject to federal and state requirements for workplace safety.[4] These regulations are designed to ensure that employers take measures to protect their employees from hazards likely to be encountered at the workplace[5] and include regulations for the development of emergency plans, where appropriate.[6] Because a diverse number of workplaces use multi-line telephone systems, it would be exceedingly difficult—if not impossible—to articulate a general "one size fits all" regulation about the

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[3] In ¶ 87 of the *E911 FNPRM*, the Commission acknowledges that information about workplace safety regulations or regulations of other agencies, state or federal, may affect its decision-making with regard to the promulgation of regulations related to multi-line telephone systems.

[4] Certain federal workplace safety requirements are discussed further in Section I.C of these Comments.

[5] *See, e.g.,* Occupational Safety and Health Act, 29 U.S.C. § 654(a) (2003).

[6] *See, e.g.,* 29 C.F.R. § 1910, Subpart E.

location and call-back information, if any, that each employer should develop, maintain, and transmit in the event of an emergency without first considering: (a) the workplace safety regulations already imposed upon such workplaces; (b) existing emergency plans in place at a given workplace; and (c) the type of workplace from which the 911 call originates. All of these inquiries exceed the scope of the Commission's undertaking and are more appropriately made by the agencies with specific jurisdiction over, and expertise in, workplace safety issues.

B. The Commission Lacks Sufficient Jurisdiction Under the Communications Act to Regulate Issues of Workplace Safety

To date, the Commission has taken action in this docket to amend its regulations to assure wide access to 911 and E911 via wireless services pursuant to jurisdiction provided by Sections 1, 4(i), 201, 208, 215, 303, and 309 of the Communications Act.[7] The regulations previously promulgated under these Communications Act provisions apply to wireless common carriers and equipment manufacturers. The jurisdictional provisions cited, however, do not confer sufficient jurisdiction for the Commission to regulate the activities of employers and workplace safety, responsibilities that have been delegated by Congress to the Department of Labor in the Occupational Safety and Health Act ("OSH Act") and the specialized agency created to deal with such issues, the Occupational Safety and Health Administration.

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[7] *Revision of the Commission's Rules To Ensure Compatibility with Enhanced 911 Emergency Calling Systems*, CC Docket No. 94-102, IB Docket No. 99-67, Report and Order, 11 FCC Rcd 18676, 18752, ¶ 164 (1996).

The nation's employers are generally beyond the Commission's Title II and Title III jurisdiction, which allow the Commission to regulate common carriers and operators of radio facilities, respectively. With these Title II and III limitations in mind, the *E911 FNPRM* posits that the Commission might have jurisdiction over MLTS operators pursuant to Sections 1 and 4(i). Courts have, however, limited the reach of these facially broad statutory sections when the Commission sought to extend its jurisdiction beyond telecommunications and the provision thereof, and would likely do the same if the Commission were to extend its E911 regulations to employers and the workplace.

For example, in *GTE Service Corp. v. FCC*,[8] the Second Circuit held that the Commission's Section 1 and 4(i) jurisdiction did not permit it to regulate the conduct of a common carrier's data processing subsidiary. In particular, the court invalidated Sections 64.702(c)(4) and (5) of the Commission's rules, which prohibited a common carrier's data processing affiliate from dealing with the carrier or using its name or symbol.[9] The Second Circuit determined that while the FCC was empowered to regulate the anticompetitive activities of common carriers, it was not permitted to regulate the activities of data processing entities: "[T]he unfair competition, restraint of trade or potential threat of monopoly, must be in a market in which the Commission has jurisdiction. The threat here is admittedly to the data processing industry over which the Commission has never asserted jurisdiction and which it has deliberately avoided regulating."[10] In the instant case, a court is also likely to conclude that while the

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8 474 F.2d 724, 735 (2d Cir. 1973).

9 *Id.* at 733.

10 *Id.* at 734.

Commission can regulate common carriers and telecommunications equipment manufacturers to promote "safety of life and property through the use of wire and radio communication,"[11] it cannot regulate the nation's employers toward the same end.

More recently, the General Accounting Office ("GAO") submitted an opinion to Congress, finding that the Commission lacked sufficient statutory authority to establish the Schools and Libraries Corporation and the Rural Health Care Corporation pursuant to Sections 4(i) and 254 of the Act.[12] The GAO specifically found that the Commission's actions under the Communications Act were circumscribed by the Government Corporation and Control Act, which the GAO determined "prohibits an agency from creating or causing creation of a corporation to carry out government programs without explicit statutory authorization."[13] Although no such prohibition exists in the OSH Act, an attempt by the Commission to promulgate regulations over workplace safety would nevertheless undermine Congress's clear delegation of such authority to the Department of Labor. The absence of express authority in the Communications Act to promulgate workplace safety regulations and the express delegation of such authority to another governmental agency should deter the Commission from attempting to exercise jurisdiction in this area.

In this proceeding, the Commission has correctly underscored the important public interest served by expanding access to E911 services and the delivery of accurate location information and callback numbers to local emergency services

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[11] 47 U.S.C. § 151.

[12] *See* Letter from the Office of General Counsel, General Accounting Office, to the Hon. Ted Stevens, United States Senate, dated Feb. 10, 1998, Comp. Gen. Dec. No. B-278820.

personnel.[14] The pursuit of a laudable objective that undeniably serves the public interest, however, does not permit the Commission to regulate entities and subject matter not within its jurisdiction, and the jurisdictional provisions found in Section 1 and 4(i) of the Act are insufficient, in and of themselves to confer jurisdiction over employers and workplace safety issues to the Commission. In *FDA v. Brown & Williamson Tobacco Corporation*, the Supreme Court held that "no matter how 'important, conspicuous, and controversial' the issue … an administrative agency's power to regulate in the public interest must always be grounded in a valid grant of authority from Congress."[15] In this case, the Commission's general power to affect regulations for the purpose of promoting safety of life and property[16] does not expand its jurisdiction sufficiently to allow the regulation of workplace safety.

In *Brown & Williamson,* the Court determined the extent of the jurisdiction granted to the Food and Drug Administration by Congress in the Food, Drug and Cosmetics Act ("FDCA"). The Court held, *inter alia,* that the grant of jurisdiction provided in one statute may be affected by other acts of Congress, particularly where Congress has spoken subsequently and more specifically to the topic at hand.[17]

The holding is instructive in this case. By enacting the OSH Act in 1970, Congress demonstrated its unambiguous intent to create a unique administrative

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13 *Id.*

14 *Report and Order,* 11 FCC Rcd at 18679, ¶ 5; *E911 FNPRM*, ¶ 86.

15 529 U.S. 120, 161 (2000).

16 *See* 47 U.S.C. §§ 151 and 154(i) (2003).

17 529 U.S. at 133 (citing *United States v. Romani,* 523 U.S. 517, 530-31 (1998)).

structure with the mission of regulating workplace safety.[18] The OSH Act specifically grants power to the Department of Labor to promulgate regulations[19] while carefully balancing federal and state obligations and areas of responsibility in the area of workplace safety.[20] If the Commission were to regulate the operators of multi-line telephone systems used in places of employment, it would be regulating an area for which the Commission has not been granted authority under the Communications Act, and would infringe on the specifically delegated authority granted by Congress to the Department of Labor.

Furthermore, had Congress intended for the Commission's jurisdiction to expand to workplace safety issues by promulgating relevant MLTS/E911 regulations, it could have expressly granted the FCC authority to do so when it passed the Wireless Communications and Public Safety Act of 1999 ("911 Act").[21] Congress did not do so. Indeed, the MLTS/E911 options being considered by the Commission, which would cause operators of multi-line systems at places of employment to manage and update databases for the transmission of specific call-back or location information and to invest

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[18] *See* 29 U.S.C. § 651(b) (2003) ("The Congress declares it to be its purpose and policy…. to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources … (3) by authorizing the Secretary of Labor to set mandatory occupational safety and health standards… [and] (9) by providing for the development and promulgation of occupational safety and health standards"). *See also Brown & Williamson,* 529 U.S. at 144 (holding that Congress's passage of several tobacco-related pieces of legislation subsequent to the original passage of the FDCA indicated its intent to create a separate regulatory regime for tobacco products, effectively excluding the FDA from exercising jurisdiction over such products).

[19] 29 U.S.C. § 651(b)(3) (2003).

[20] 29 U.S.C. §§ 651(b)(11) and 667 (2003).

[21] 47 U.S.C. § 615; *See also Implementation of 911 Act; The Use of N11 Codes and Other Abbreviated Dialing Arrangements*, WT Docket No. 00-110, CC Docket No. 92-105, Fourth Report and Order and Third Notice of Proposed Rulemaking, 15 FCC Rcd 17079 (2000). Notably, the Commission's role to "encourage and support" efforts by States to deploy end to end emergency communications infrastructure was limited to consultation with States and affected groups and encouragement of development and implementation of statewide deployment plans.

in new services or equipment, would be inconsistent with the 911 Act's command that the Commission is not authorized or required "to impose obligations or costs on any person" resulting from its activities under the 911 Act.[22]

C. Agencies With Specific Expertise in the Regulation of Workplace Safety Are Better Positioned to Determine What Regulations, If Any, Will Best Protect American Workers

Even if the Commission were to determine that it possesses the legal authority to exercise jurisdiction over workplace safety issues, it would be unwise to exercise such jurisdiction. As described below, the Commission should defer regulating the type of information that employers using multi-line telephone systems are required to transmit for emergency calls to those agencies with specific jurisdiction, expertise, and experience in regulating workplace safety.

First, the legal authority of OSHA and other similar state agencies to promulgate regulations for workplace safety is not in question. In response to the Commission's request for comments in paragraph 11 of the *E911 FNPRM*, Ad Hoc notes that OSHA has jurisdiction over employers and the legal authority to issue mandatory and non-mandatory workplace safety regulations.[23] This authority stands in marked contrast to the concerns raised in Section I.B above regarding the Commission's legal authority to regulate workplace safety and the owners of multi-line telephone systems.

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[22] *Id.*

[23] 29 U.S.C. §§ 651(b)(3) and (9) (authority of Secretary of Labor to promulgate workplace regulations over businesses affecting interstate commerce) and 654(a) (applicability of obligations to employers).

Second, OSHA has promulgated numerous workplace safety and health standards and has developed an expertise about the unique issues associated with regulating employers and protecting employees.[24] This knowledge, which is outside the unique expertise of the Commission, puts OSHA in a much better position to make certain that any requirements relating to the transmission of specific information to emergency services personnel will, in fact, improve workplace and employee safety and, most importantly, are properly integrated with existing OSHA standards and regulations relating to workplace emergency plans.[25]

Importantly, OSHA has addressed these issues with greater specificity than is likely to be found in regulations promulgated by the Commission. For example, OSHA prescribes that employers' emergency action plans contain certain "minimum elements," one of which includes "procedures for reporting a fire or other emergency."[26] To the extent that the transmission of detailed call-back or location information from places of employment is appropriate, OSHA is in a much better position to make such a determination through its own rulemaking procedures and specialized expertise of workplace safety issues. Indeed, the Commission lacks the experience and knowledge of workplace safety issues to determine the specific type of location and call-back information that would be most effective to assist local emergency services personnel at a workplace. Even the Commission's implicit assumption that the location from which a call to 911 was placed is the location to which emergency personnel or return calls from

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[24] *See generally* 29 C.F.R. Part 1910 ("Occupational Safety and Health Standards").

[25] *See* 29 C.F.R. Part 1910, Subpart E ("Means of Egress").

[26] 29 C.F.R. § 1910.38(c)(1).

911 operators should be directed[27] may not be accurate in a large number of cases because emergency action plans at a place of employment may provide for different emergency reporting procedures. Indeed, without knowing the type of emergency for which assistance is required or the type of facility to which assistance is to be directed, the transmission of call-back or location information may be inadequate or counter-productive to the effective deployment of emergency services.

Third, different workplaces have different workplace safety requirements. OSHA is experienced in examining on an industry-by-industry basis the specific types of standards that would be appropriate for the type of activity undertaken at that workplace.[28] Ad Hoc cautions the Commission against attempting to regulate multi-line telephone systems in a manner that purports to apply equally to all workplaces; such regulation may not adequately consider the unique emergency notification requirements of particular places of employment. In the case of emergency planning, OSHA has not only set out the specific requirements in Part 1910, Subpart E of its regulations with which regulated employers must comply, but has also published an Appendix of non-mandatory criteria for assisting employers to comply with such criteria.[29] To the extent that OSHA has articulated with specificity these types of recommendations for the

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[27] *E911 FNPRM*, ¶ 86

[28] OSHA has promulgated industry-specific requirements reflecting its expertise on workplace safety in industries as diverse as pulp, textiles, telecommunications, laundry operations, logging, electric power, and grain handling. *See, e.g.,* 29 C.F.R. Part 1910 (Occupational Safety and Health Standards), Subpart R (Special Industries), §§ 1910.261- .272

[29] *See* 29 C.F.R. Part 1910, Appendix to Subpart E. This Appendix includes such specific recommendations as the following examples: (i) development of floor plans or workplace maps which clearly show the emergency escape routes should be included in the emergency action plan; (ii) color coding exit routes to aid employees in their evacuation; (iii) development of what rescue and medical first aid duties are to be performed and by whom, notifying employees of what actions they are to take in these emergency situations that the employer anticipates may occur in the workplace.

development of workplace emergency procedures, it is certainly in a better position than the Commission to determine the appropriate call-back or location information that a particular type of workplace should transmit to emergency services personnel in the event of a workplace emergency.

Finally, OSHA and its state counterparts are experienced and better equipped to undertake appropriate cost/benefit analyses to weigh the effectiveness of E911/MLTS regulations relative to the potentially significant costs of compliance that could be imposed upon employers using such systems. As noted above, OSHA has set forth specific emergency planning requirements in Part 1910, Subpart E of its regulations with which regulated employers must comply, and has also published an Appendix of non-mandatory criteria for assisting employers to comply with such criteria.[30] The fact that, in some cases, OSHA has articulated non-mandatory recommendations for compliance with its standards reflects its judgment about the appropriate cost/benefit of imposing mandatory regulations. Furthermore, state agencies with missions similar to OSHA are in a much better position to determine what capabilities local emergency services providers currently have in place to use transmitted information prior to imposing requirements that such information be transmitted from workplaces. These determinations are critically important to avoid the imposition of costly regulations that may not produce commensurate benefits.

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30 *Id.*

For the reasons set forth in this Section, Ad Hoc urges the Commission to defer any regulation of operators of multi-line systems at places of employment to the agencies with expertise in regulating workplace safety issues.

II. CONCLUSION

Because the Commission lacks jurisdiction over operators of MLTS equipment, it should not promulgate regulations addressing the type of ANI/ALI information that this equipment should send to PSAPs or the measures that operators of MLTS equipment must take to establish and maintain these databases. Rather, the FCC should allow federal and state agencies with jurisdiction over, and specialized knowledge of, workplace safety to promulgate such regulations.

Respectfully submitted,

James S. Blaszak
Stephen J. Rosen
Andrew M. Brown
Levine, Blaszak, Block and Boothby, LLP
2001 L Street, NW
Suite 900
Washington, DC 20036
202-857-2550

Counsel for
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